No. 11747.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

L. Wallace and E. B. Landry, a copartnership doing business as Fullerton Manufacturing Company,

Appellants,

vs.

World Fire and Marine Insurance Company of Hartford, Connecticut, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

Appellee takes approximately one page of its Brief (pp. 25-6) in discussing the meaning and construction of the pertinent provisions of the policy. It would not appear to be an overstatement to say that appellee does not seriously challenge the construction of the policy contended for by appellants. (Opening Brief, Points III and IV, pp. 14-26.)

Appellee rests its case on two contentions. First, that the District Court erred in finding against appellee on its defense of concealment and misrepresentation, and, second, that the report of January 3, 1946, was a report under the policy in suit, and hence limited appellants' recovery.

I.

The Defense of Concealment and Misrepresentation.

With reference to the question of concealment, there are two complete answers to appellee's contention. In the first place, as pointed out by the District Court in its Opinion [Tr. pp. 36-39] the concealment was immaterial and hence constituted no defense. Since sections 332 and 359 of the California Insurance Code require a concealment or misrepresentation to be material in order to avoid a policy, this holding completely disposed of this defense. And we believe the District Court was correct in so holding. The "Value Reporting" and "Full Reporting" clauses result in diminishing the insurer's liability where there is underreporting, so that rather than being harmed thereby, the insurer actually benefits therefrom. Obviously, these clauses were inserted by the insurer with that very result in mind, and it is therefore fair to state that underreporting is completely immaterial to the insurer. As a matter of fact, the underreporting under the prior policy resulted in a reduction of the limit of liability from $30,000.00 in the old policy to $15,000.00 in the new policy, again a matter of benefit to the insurer. As to the question of premium, the insured is required to pay a premium based on the actual values at risk, and with its right of audit the insurer has no difficulty in ascertaining and collecting the full amount due.

And a further and conclusive answer to appellee's contention in this respect is the District Court's specific finding that the underreporting was immaterial. [Findings,

par. IX, Tr. p. 45.] This was a finding of fact and since appellee has not appealed from the judgment, it is now precluded from claiming that this finding was erroneous:

> " 'Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken'."

Morley Co. v. Maryland Casualty Co., 300 U. S. 185.

See also:

Thomas Bishop Co. v. Santa Barbara County (C. C. A. 9), 96 F. (2d) 198.

Concealment and misrepresentation are affirmative defenses to be pleaded and proved by the defendant and before they are effective the trial court must find the facts, including materiality, in favor of the defendant. Since the finding on this issue was adverse to appellee and since appellee has not appealed, in so far as a review of the case by this Court is concerned, the defense should be regarded as if it were not in the case.

II.

The January 3rd Report.

Appellee bases its argument on this point entirely on paragraph VI of the Agreed Statement, ignoring entirely the remarks of Court and Counsel at the trial, the Court's Opinion, the Findings, and the report itself, all of which are referred to in Appellants' Opening Brief (pp. 30-32, 36).

In the first place, paragraph VI of the Agreed Statement makes no mention of the policy in suit, and when it is read in conjunction with paragraph IX, which also refers to the identical report of January 3, 1946, at best the Agreed Statement becomes ambiguous as to just what was intended in so far as reference to the January 3rd report is concerned.

But when the other matters above referred to are considered, as they must be, it seems clear that all parties and the Court understood the reference in paragraphs VI and IX of the Agreed Statement to be to one and the same report, namely the last report of values under the old policy. We particularly call attention to two matters which we believe are controlling in this regard:

1. The following statement in the District Court's Opinion [Tr. p. 35]:

> *"If plaintiff's contention that the January 3rd report was not made under the new policy is accepted* * * *"

Certainly, the Court would not have so stated, if it had understood the Agreed Statement to mean that the January 3rd report was *actually* by its terms a report under the new policy.

2. The Findings, which leave no doubt that the January 3rd report was filed under the old policy, and was merely *construed* by the Court as limiting the appellants' recovery under the new policy. There are only two references to this report in the Findings. The first is in paragraph VI where it is stated:

> "VI.
>
> The Court further finds that the defendant issued a policy of insurance in December, 1944 in the provisional amount of $30,000 on which a premium was paid. That while said policy was in full force and effect the plaintiffs requested that the provisional limit be reduced to $15,000, which was accordingly done. *That under said policy of insurance the plaintiffs reported to the defendant at the end of each month the values on hand for the preceding month. That the plaintiffs reported to the defendant* on the 31st day of January, 1945 that the actual cash value of the property at the plaintiffs' place of business was $5000 when as a matter of fact the actual cash value was the sum of $19,856; * * * and *on the 3rd day of January, 1946 plaintiffs reported* the cash value of the property as of December 31, 1945 to be the sum of $2000 when in truth and in fact the actual cash value was, as of December 31, 1945, the sum of $28,140.72."

Here is a definite finding that the January 3rd report was filed under the old policy. Then comes the only other reference to the January 3rd report, to wit, in paragraph VIII of the Findings, as follows:

> "VIII.
>
> The Court finds that under the terms and conditions of the policy in effect at the time of the fire the report made on January 3, 1946, determines the liability of the defendant to the plaintiffs and that the

defendant's liability shall be in the proportion that \$2000/28,140.78 X the loss of \$27,253.18 and that the limit of coverage amounts to \$1936.92."

Taking these two references together, it is submitted that the Court found (1) that the January 3rd report was filed under the old policy, and (2) that under the provisions of the new policy, the January 3rd report (which was filed under the old policy), must be regarded as the "last report filed prior to the loss," within the meaning of those words as used in the new policy and hence limited appellants' recovery under the new policy. Even if there be a conflict between the Agreed Statement and the Findings (which appellants do not concede), the Findings would control, and since appellee has not appealed, it is in no position to attack the Findings.

Appellants feel confident that based on the record before it, this Court will conclude that the report of January 3rd was a report under the old policy, and not *actually* a report under the new policy. Whether, having so concluded, this report should nevertheless be held to limit appellants' recovery under the new policy is an entirely different question, which involves a matter of policy construction. (Opening Brief pp. 26-28.) Appellants submit that this case should be decided by this Court on that question of policy construction, and not, as requested by appellee, on an untenable and unfair construction of one paragraph in the Agreed Statement. We feel confident that this Court will not ignore realities and indulge in speculation directly contrary to the actual facts in reaching a decision in this case.

As to the District Court's finding that the January 3rd report, although a report under the old policy, must never-

theless be construed as a report under the new policy and hence limit appellants' recovery, we wish to again emphasize that the point involved is solely one of policy construction, entirely divorced from any question of concealment or misrepresentation. Cases relied on by appellee such as *Atlantic Fruit Co. v. Hamilton Fire Ins. Co.*, 167 N. E. 184; *Rivaz v. Gerussi Bros.*, 6 Q. B. D. 222 and the cases cited on page 27 of appellee's brief deal entirely with the question of concealment and misrepresentation, and in no way bear upon the question of *policy construction* involved here. As we have pointed out, there is no issue of concealment before this Court.

Appellants respectfully submit that the decision in this Court should turn on the question of whether a proper construction of this policy permits a finding that the last report of values under the prior policy is to be considered as "the last report of values filed prior to the loss" under the policy in suit. In other words, does the quoted language refer only to reports filed under the policy in suit, or does it also encompass reports filed under a prior policy. Appellants rest their case on the contention that since the two policies are separate and distinct (regardless of whether one is a renewal policy) and since no mention is made in the policy of reports filed under a prior policy, the quoted language can only be construed as referring to reports filed under that policy. To hold otherwise would not only do violence to the language used, but would run counter to well settled rules of construction applicable to insurance policies.

Respectfully submitted,

Benjamin J. Goodman,

Attorney for Appellants.